Office - Supreme Court, U.S.
FILED
NOV 14 1984
ALEXANDER L. STEVAS,
CLERK

(3)

Case No. 84-623

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

THE CINCINNATI BELL TELEPHONE COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,

AND

OFFICE OF CONSUMERS' COUNSEL,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION OF APPELLEE, OFFICE OF THE CONSUMERS' COUNSEL TO DISMISS APPEAL, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

WILLIAM A. SPRATLEY
CONSUMERS' COUNSEL

RICHARD P. ROSENBERRY
Counsel of Record
JANINE L. MIGDEN
LAWRENCE F. BARTH
Associate Consumers' Counsel

137 East State Street
Columbus, Ohio 43215
(614) 466-8574

COUNSEL FOR APPELLEE
THE OFFICE OF THE CONSUMERS' COUNSEL

31 pp

TABLE OF CONTENTS

Page

Table of Authorities ii

I. Statement of the Case 1

II. Motion to Dismiss and in the Alternative, Motion to Affirm. . . 9

III. Memorandum in Support 10

IV. Conclusion. 23

V. Appendix. 25

TABLE OF AUTHORITIES

Cases

Page

Arizona Grocery Co. v. Atchison, Topeka, and Santa Fe Railway Co., 284 U.S. 370 (1932). 16

Bigelow v. Old Dominion Copper Mining and Smelting Co., 225 U.S. 111 (1912) 17

Cincinnati Bell Telephone Co., PUCO Case No. 82-1338-TP-AIR, Entry on Rehearing, March 9, 1983. . . . . 3, 7, 12

Cincinnati Bell Telephone Co., PUCO Case No. 82-1338-TP-AIR, Opinion and Order, January 7, 1983. . . . . 1, 4

Effros v. Nationwide Corp., 12 Ohio St.3d 191, 465 N.E.2d. 1309 (1984). 16, 17

In re Amendment of Part 31, 92 F.C.C.2d 864 Memorandum Opinion and Order, (January 6, 1983). . . .2, 6, 11, 12, 16

North Carolina Utilities Comm. v. FCC, (4th Cir. 1976) 537 F.2d 787, cert. denied 429 U.S. 1029 (1976) 20

North Carolina Utilities Comm. v. FCC, (4th Cir. 1979) 552 F.2d 1036, cert. denied 434 U.S. 874 (1977). 20

Prentis v. Atlantic Coast Line, 211 U.S. 210 (1908). 15

St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38 (1936) 16

Smith v. Illinois Bell Tel. Co., 282 U.S. 133 (1930). 20

Social Security Bd. v. Nierotko, 327 U.S. 358 (1946). 20

Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm., No. LRC 84-247 (E.D. Ark. March 30, 1984) 11

State Corp. Comm. v. Wichita Gas Co., 290 U.S. 561 (1934). 7, 15

Tagg Bros. & Moorhead v. U.S., 280 U.S. 420 (1929). 15

Thompson v. Whitman, 18 Wall 457 (1873) 17

Virginia State Corp. Comm. v. FCC, 737 F.2d 388 (4th Cir. 1984) . 6, 7, 8

Statutes

28 U.S.C. §1257. . . . . .10, 13

28 U.S.C. §1738. 14

28 U.S.C. §2342(1) 21

Ohio Rev. Code §4903.13. . . . . .11, 22

Ohio Rev. Code §4905.18. . . . . .12, 25

Amendments

Art. IV, Sec. 1. . . . . .13, 14

Art. VI, para. 2 . . . . . .13, 18

Other Authorities

U.S. Sup. Ct. R. 16b 10, 23

Ohio Sup. Ct. R. IX. 25

I. STATEMENT OF THE CASE

Appellant, Cincinnati Bell, filed an application for an increase in rates with the Public Utilities Commission of Ohio (PUCO) on March 1, 1982. The appellant based the application in part on the use of "remaining life" and "equal life group" depreciation accrual rates for its intrastate telephone equipment. The remaining life methodology had not been approved by the Public Utilities Commission of Ohio in the past.

On January 7, 1983, the PUCO issued its Opinion and Order which granted, in part, CBT's request for a rate increase. Appendix to Jurisdictional Statement at A36-A130. In its Order the Public Utilities Commission adopted appellant's proposed depreciation rates. The PUCO made this change in pre-existing policy after taking administrative notice of two ac-

tions of the Federal Communications Commission (FCC). Id. at A74-A75. The FCC actions included the FCC's December 22, 1982, Memorandum Opinion and Order in which it purportedly preempted the states from prescribing depreciation rates different than those prescribed by the FCC. The PUCO noted that it would have preferred to use the whole life methodology. Id. at A74.

On February 7, 1983, Appellant and the Appellee, the Office of the Consumers' Counsel, applied for rehearing. CBT's application dealt with issues extraneous to the case sub judice. Appellee Consumers' Counsel presented several issues in error, the first being that the PUCO erred in adopting remaining life depreciation accrual rates. Id. at 29.

On March 9, 1983, the PUCO denied CBT's appplication for rehearing in full. Id. at A25-A35. Appellee's application for rehearing was granted as to the issue of remaining life depreciation. In determining that appellant's jurisdictional rates should be based on whole life depreciation rates the PUCO found that neither it nor the FCC could rule on the question of federal preemption. Id. at A30. Additionally, the PUCO said its decision to use whole life depreciation rates was based on a review of the record in CBT's rate proceeding and the recommendation of the PUCO staff, which was also part of that record. Id.

The day the PUCO released its Entry on Rehearing (March 9, 1983) Cincinnati Bell filed a Notice of Appeal in the Ohio Supreme Court and requested a stay of the

PUCO order. (CBT's appeal was based on depreciation and other issues.) On March 16, 1983, the Ohio Supreme Court granted the request for a stay. This had the effect of requiring Cincinnati Bell's customers to pay for telephone services at the tariff rate established in the PUCO's January 7, 1983, Opinion and Order. CBT was later required to pay into a trust fund the difference between the rates in effect and those authorized by the PUCO on March 9, 1983.

At the Ohio Supreme Court CBT argued that 1) the PUCO was bound to give res judicata effect to the FCC's rulemaking proceeding on depreciation; 2) when compliance with both PUCO and FCC orders is impossible, the FCC order must prevail; and 3) that Congress has either explicitly or implicitly reserved to the FCC

the right to prescribe depreciation rates for intrastate ratemaking purposes.

Briefs were submitted and on December 6, 1983, oral arguments were held before the Ohio Supreme Court. On April 10, 1983, Consumers' Counsel, by motion, requested the Ohio Court to take judicial notice of the decision of the United States District Court, Eastern District of Arkansas, Western Division, in Southwestern Bell Telephone Company vs. Arkansas Public Service Commission, et al. This motion was opposed by CBT in a memorandum in response. The Court granted OCC's motion on May 2, 1984.

On June 13, 1984, Cincinnati Bell informed the clerk of the Ohio Supreme Court of the decision of the U.S. Court of Appeals for the Eighth Circuit in which it overturned the Arkansas district

court. On June 19, 1984, CBT notified the Court of the decision of the U.S. Court of Appeals for the Fourth Circuit upholding the FCC's Memorandum Opinion and Order in which it sought to preempt state regulation as to the setting of intrastate rates for depreciation. Appendix to Jurisdictional Statement at A131-A157. (That case, Virginia State Corp. Comm. v. FCC, 737 F.2d, 388 (4th Cir. 1984) Motion for Rehearing En Banc denied, will likely be before this Court within a matter weeks.) This was done by letter to the clerk of the Ohio Supreme Court. At no time did Cincinnati Bell move the Court to take judicial notice of the Fourth Circuit decision, or request the opportunity to file an additional brief or to make an additional oral argu-

ment on the issue of the res judicata effect of Virginia State Corp., supra.

On July 25, 1984, the Ohio Supreme Court affirmed the March 9, 1983, Entry on Rehearing of the PUCO as to Cincinnati Bell. CBT made no effort to place the res judicata effect of Virginia State Corp., supra, before the Ohio Supreme Court although its rules specifically provide for a motion for rehearing. See Appendix at the end of this brief.

The Court held, inter alia, that res judicata would not attach to a rulemaking proceeding of a federal administrative agency. The court relied on State Corp. Comm. of Kansas v. Wichita Gas Co., 290 U.S. 561 (1934), in reaching its decision.

The Ohio Supreme Court also concluded that it did not have authority to rule on the validity of the FCC action. That

power was reserved to the federal circuit courts of appeal. The court held that it was confined to applying Ohio law and that under such a test the PUCO's action was lawful. Appendix to Jurisdictional Statement at A7.

The failure of CBT to seek rehearing so that it could place the issue of the res judicata effect of Virginia State Corp., supra, before the court was noted implicitly by Justices Brown and Holmes. In separate dissenting opinions, both called for rehearing on that issue.

On July 25, 1984 when the Ohio Supreme Court handed down its opinion, CBT filed with the Ohio Court a Notice of Appeal to the U.S. Supreme Court. Cincinnati Bell also filed a motion with the Ohio Supreme Court seeking approval for a supersedeas bond, a writ of supersedeas

or a stay of execution during the pendency of its appeal to this Court.

On July 26, 1984, Cincinnati Bell served upon the parties an Application for Stay of Judgment of the Supreme Court of Ohio and Approval of Supersedeas Bond. On August 2, 1984, the U.S. Supreme Court issued a temporary stay pending responses by the other parties. Responses were received and on August 21, 1984, a stay was granted pending the outcome of this appeal.

II. MOTION TO DISMISS AND IN THE ALTERNATIVE, MOTION TO AFFIRM

The Office of the Consumers' Counsel respectfully requests that the United States Supreme Court dismiss the appeal filed by the Cincinnati Bell Telephone Company or in the alternative, affirm the

Ohio Supreme Court's decision on the grounds that the judgment of the Court rests on an adequate non-federal basis. Sup. Ct. R. 16(b). The issues dispositive of this Motion to Dismiss will be discussed more fully below.

III. MEMORANDUM IN SUPPORT

A. The Ohio Supreme Court Lawfully Applied State Law In Affirming A Decision of the State Public Utilities Commission Involving the Establishment of Intrastate Rates.

Cincinnati Bell argues that an appeal is warranted under 28 U.S.C. §1257(1) which allows an appeal when the validity of a statute of the United States is drawn into question and the decision is against its validity. Jurisdictional Statement at 3. The federal statute in question is a rulemaking decision by the FCC. In re Amendment of Part 31, 92

F.C.C.2d 864, Memorandum Opinion and Order, (January 6, 1983). The fatal flaw in Cincinnati Bell's argument is that the Ohio Supreme Court did not rule on the validity of the FCC decision. The Court expressly stated that the Ohio Public Utilities Commission had neither the jurisdiction nor the inclination to enjoin, set aside, suspend, or determine the validity of the FCC order. At the same time, the Ohio Supreme Court acknowledged that it had jurisdiction to review the orders of the PUCO under Ohio Rev. Code §4903.13. Appendix to Jurisdictional Statement at A7. The Ohio Supreme Court's decision was based on such a review. Its discussion, of Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm., No. LRC 84-247 (E.D. Ark. March 30, 1984) is merely dictum in which the

Court took the opportunity to set forth its views as to the propriety of the FCC Memorandum Opinion and Order. Id. at A7-A9.

It is important to note that Cincinnati Bell's appeal is based on the PUCO's Entry on Rehearing (March 9, 1983). In its Entry on Rehearing, the Public Utilities Commission determined that neither it nor the FCC was empowered with the authority to rule on the issue of federal preemption, and therefore, consistent with its statutory mandate, it was going to apply state law and continue in the use of the most reasonable depreciation methodology. Id. at A30. Accordingly, the PUCO applied Ohio Rev. Code §4905.18 which vests it with the authority to prescribe the proper and adequate charges for depreciation. Thus, it is clear that

the Ohio Supreme Court's decision affirming the decision by the PUCO is based solely on state law. No federal question arises.

B. The PUCO's application of traditional and longstanding state ratemaking principles in the regulation of intrastate utility rates is not repugnant to the Constitution of the United States.

In arguing jurisdiction, Cincinnati Bell relies on 28 U.S.C. §1257(2) under which the U.S. Supreme Court may review a decision in which a state statute which is being challenged as repugnant to the U.S. constitution is upheld. Jurisdictional Statement at 3. The United States constitutional provisions which CBT invokes are the Full Faith and Credit Clause (Art. IV, §1) and the Supremacy Clause (Art. VI, para.2). Id. at I.

1. The Full Faith and Credit Clause (Art. IV, Sec. 1) and The Full Faith and Credit Statute (28 U.S.C. §1738)

Cincinnati Bell posits that the doctrine of full faith and credit required the PUCO to give effect to the FCC Memorandum Opinion and Order, supra. Jurisdictional Statement at 14. Additionally, CBT claims that the Order of the FCC is res judicata as to any subsequent determination by the PUCO on the issue of depreciation rates. Id. The Ohio Supreme Court disagreed with CBT, holding that where an administrative proceeding involves legislative as opposed to adjudicative functions, res judicata does not apply. Appendix to Jurisdictional Statement at A6.

In its Jurisdictional Statement, CBT cites numerous cases for the proposition

that Ohio ratemaking is legislative in nature. Id. at 4. If Ohio ratemaking is legislative in nature, then the FCC order is a fortiori legislative in nature as well. As a result, res judicata can not apply. In Prentis v. Atlantic Coast Line, 211 U.S. 210 (1908) the Court held that res judicata will not apply to administrative proceedings that are legislative in nature. In Tagg Bros. & Moorhead v. U.S., 280 U.S. 420 (1929), the Court noted that a rate order is not res judicata because unlike an adjudication, it may be superseded by another order. Such is the case with the FCC Memorandum Opinion and Order, supra. Similarly, the Court held in State Corp. Commission v. Wichita Gas Co., 290 U.S. 561 (1934) that information gathering to determine future policies is legislative

in nature, and therefore, res judicata can not apply. The FCC Memorandum Opinion and Order purports to set future policy for the method of depreciating equipment and can be changed any time the FCC desires, unlike an adjudication. Other cases supporting the proposition that res judicata can not attach to ratemaking decisions include Arizona Grocery Co. v. Atchison, Topeka, and Santa Fe Railway Co., 284 U.S. 370 (1932) and St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38 (1936). The conclusion to be reached is that because the decision of the FCC was legislative and not adjudicative, res judicata is inapplicable.

Cincinnati Bell cites numerous cases including Effros v. Nationwide Corp. 12 Ohio St.3d 191, 465 N.E.2d 1309 (1984) for the proposition that res judicata ef-

fect must be given to federal decisions. These cases are distinguishable from the instant case. Specifically, in Effros v. Nationwide Corp., the Ohio Supreme Court's decision was limited strictly to concurrent adjudications. This is clearly different from the instant case where the subject matter is of a legislative character. Therefore, CBT's arguments must be rejected..

The full faith and credit argument by the appellant is equally inapplicable here. It is a well settled doctrine that the courts in one state are not required to view as conclusive, judgments of another state which had no jurisdiction over the subject matter. Bigelow v. Old Dominion Copper Mining and Smelting Co. 225 U.S. 111 (1912); Thompson v. Whitman, 18 Wall 457 (1873). (While the Ohio Su-

preme Court did not rule on the jurisdiction of the FCC to set intrastate rates, nevertheless the FCC was without subject matter jurisdiction to determine intrastate depreciation rate methodologies.) The establishment of intrastate rates based upon a long history of such a practice and supported by state law is within the subject-matter jurisdiction of the state. Thus, the Full Faith and Credit Clause is not relevant to this case. CBT has failed to allege sufficient grounds to justify this appeal.

2. The Supremacy Clause (Art. VI, para 2)

Cincinnati Bell postulates that the U.S. Supreme Court must hear this case because the decision of the Ohio Supreme court is in derogation of the Supremacy Clause (Art. VI, para.2) of the United

States Constitution. Jurisdictional Statement at 23. This is simply not the case. As stated supra, this case involves only the application of state law by a state court involving matters traditionally within its purview. It would be incorrect to find jurisdiction on the basis of the Supremacy Clause when it is not an issue in this case. While in the court below Cincinnati Bell focused on the preemption issue as opposed to the Supremacy Clause, the Ohio Supreme Court nevertheless recognized it was not an issue and decided the case on state grounds. Appendix to Jurisdictional Statement at A7. Nevertheless, in dictum, the court pointed out that the FCC's jurisdiction had been expressly limited to exclude intrastate regulation. Id. at A7-A8.

Without embarking on a lengthy discussion on preemption, it should be noted that a federal administrative agency cannot preempt state legislation based simply on its own motion. Social Security Bd. v. Nierotko, 327 U.S. 358 (1946). Moreover, it is a well established precept that the states have the authority to establish intrastate rates for companies operating within their boundaries. North Carolina Utilities Comm. v. FCC (4th Cir. 1976) 537 F.2d 787, cert. denied 429 U.S. 1029 (1976); North Carolina Utililties Comm. v. FCC (4th Cir. 1977) 552 F.2d 1036, cert. denied 434 U.S. 874 (1977); Smith v. Illinois Bell Tel. Co., 282 U.S. 133 (1930). The actions of the Ohio Supreme Court were proper and based solely on state law. A federal question

regarding the Supremacy Clause does not arise in this case.

C. The Ohio Supreme Court has not enjoined, set aside, suspended or determined the validity of a final order of the Federal Communications Commission.

Congress has reserved to the federal courts of appeal the exclusive authority to review orders of the FCC. 28 U.S.C. §2342(1). Cincinnati Bell argues that the Ohio Supreme Court's failure to "give effect" to the FCC's order of December 22, 1982, amounted to overruling the FCC. Jurisdictional Statement at 23. This is simply not the case. The Ohio Supreme Court does not have the authority to disturb an order of the FCC and it acknowledged that fact in its opinion. Appendix to Jurisdictional Statement at A7. The court was limited in its review

to determining whether or not the PUCO's decision was unlawful pursuant to Ohio Revised Code §4903.13. Jurisdictional Statement at 9.

CBT placed the Ohio Court in a dilemma. On one hand it argued that the court could not rule on the validity of the FCC order and on the other it argued that the Court must reverse the Commission because the FCC order preempted the State Commission. If the Ohio Court reversed the Commission, finding that the FCC preempted the field, the Court would have exceeded its authority. Yet in affirming the Ohio Commission based on state grounds, the Court is still criticized for not following the FCC decision. With these issues placed before it the court would run afoul of CBT's position whichever direction it turned.

The Ohio Supreme Court reasoned that it could not rule on the FCC order but had to confine itself to applying the law within its jurisdiction. Appendix to Jurisdictional Statement at A7.

IV. CONCLUSION

Cincinnati Bell has not succeeded in proving the requisite nexus between a State Supreme Court decision and the denial of the application of a Federal law or constitutional provision. Stated differently, CBT has failed to show that the Ohio Supreme Court decision does not rest on an adequate non-federal basis. Sup. Ct. R. 16(b). Therefore, the Office of the Consumers' Counsel Motion to Dismiss should be granted.

Respectfully submitted,

WILLIAM A. SPRATLEY
CONSUMERS' COUNSEL

RICHARD P. ROSENBERRY
Counsel of Record
JANINE L. MIGDEN
LAWRENCE F. BARTH
Associate Consumers' Counsel

Office of the Consumers' Counsel
137 East State Street
Columbus, Ohio 43215
(614) 466-8574

Counsel for Appellee

V. APPENDIX

Rule IX

MOTIONS FOR REHEARING AND ISSUANCE OF MANDATE

Section 1. Motion for Rehearing

A motion for rehearing shall be filed within ten days after the announcement of the decision. Such motion must be confined strictly to the grounds urged for rehearing and must not constitute a reargument of the case. Notice of such motion shall be served on opposing counsel who shall have five days to file his memorandum contra.

§4905.18 Depreciation account. (GC §614-49)

Every public utility shall carry a proper and adequate depreciation or deferred maintenance account, whenever the public utilities commission, after investigation, determines that a depreciation account can be reasonably required. The commission shall ascertain, determine, and prescribe what are proper and adequate charges for depreciation of the several classes of property for each public utility. The public utility commission shall require every telephone company to carry a proper and adequate depreciation or deferred maintenance account and shall ascertain, determine, and prescribe what are proper and adequate charges in each exchange area of such

company. The charge for depreciation shall be such as will provide the amount required over the cost and expense of maintenance to keep the property of the public utility in a state of efficiency corresponding to the progress of the art or industry. The commission may prescribe such changes in such charges for depreciation as it finds necessary.